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Supreme Court of the United States

October Term, 1976

No. 76 - 136

RICHARD RIOS HERRERA,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE DEPARTMENT, SUPERIOR COURT
OF CALIFORNIA, IN AND FOR THE COUNTY OF ORANGE

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

Petitioner has attached to the petition, as appendix page 3, a copy of the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Orange, filed without opinion, June 1, 1976.

JURISDICTION

The jurisdictional facts of the case are adequately set forth within the petition.

QUESTIONS PRESENTED

1. **Does Section 11550 of the California Health and Safety Code, prohibiting anyone from using or being under the influence of a restricted drug without prescription, constitute "cruel and unusual punishment" violative of the Eighth Amendment to the United States Constitution?**

2. **Does the imposition of a mandatory ninety-day county jail sentence upon a convicted user of heroin deny him "equal protection of the laws" as guaranteed by the Fourteenth Amendment to the United States Constitution?**

STATEMENT OF THE CASE

The statement of the case is adequately set forth in the petition with the additional fact that the judgment of the Municipal Court was affirmed by the Appellate Department of the Superior Court of the State of California on June 1, 1976.

STATEMENT OF FACTS

While contended by respondent to be inadequate to support petitioner's position, the statement of facts in the

petition, representing as it does the entire Settled Statement of Facts on Appeal, *verbatim*, cannot be enlarged upon nor productively altered by repetition or paraphrase by respondent.

ARGUMENT

Petitioner contends that California Health and Safety Code Section 11550 unconstitutionally punishes addiction to opiates contrary to the mandates of the Eighth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment. The section does not do so, and petitioner lacks standing to urge such a contention, since there is no indication that he is addicted.

Petitioner's second argument is that the section denies him "equal protection of the laws" in that it punishes the user of opiates more harshly than the seller. In fact, the user is punished much less severely than the trafficker in narcotics, and the punishment meted out to users is reasonably related to and commensurate with the state's program for combating narcotics abuse.

I

It Is Not Unconstitutionally "Cruel And Unusual" To Punish A User Of Narcotics Through The Imposition Of Criminal Sanctions.

Petitioner first contends that his prosecution under California Health and Safety Code Section 11550 violates the Eighth Amendment proscription against "cruel and unusual punishments" as made applicable to the states by the Fourteenth Amendment. His reliance in this argument upon *Robinson v.*

California, 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417, is misplaced. A reasonably thorough reading of *Robinson* can only be said to compel denial of the petition on this ground.

Subsequent to the Court's decision in *Robinson,* the California Legislature, in 1963, amended then Section 11721 of its Health and Safety Code (now Section 11550) by deleting the words " . . . or be addicted to the use of narcotics . . . " (Cal. Stats. 1963, ch. 913, p. 2162), leaving the statute in its present form which forbids anyone to "use or be under the influence of any controlled substance" including heroin. This amendment was interpreted by the California Supreme Court as legislative compliance with the mandate of the *Robinson* decision and has been so interpreted for thirteen years. *In re Carlson,* 64 Cal. 2d 70, 48 Cal. Rptr. 875; *In re Becerra,* 218 Cal. App. 2d 746, 32 Cal. Rptr. 910. It is respectfully submitted that this interpretation represents a correct reading of *Robinson.*

As pointed out in the *Robinson* opinion, it is now more than fifty years since this Court explicitly recognized the power of the states to regulate the *use* of narcotic drugs within their borders. In *Minnesota ex rel. Whipple v. Martinson,* 256 U.S. 41, 65 L. Ed. 819, 41 S. Ct. 425, the Court held:

> "There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and *use* of dangerous and habit-forming drugs." 256 U.S. at 45. Emphasis added.

This is precisely what the California Legislature has done through Health and Safety Code Section 11550: it has abandoned any attempt to punish addiction and concentrates

instead upon use. This Court recognized the state's right to regulate in the area of use in the *Robinson* case. Justice Stewart's discussion for the Court of the distinction between the use of narcotics and addiction thereto (370 U.S. 660, 664, 666) carefully limited the Court's holding to invalidation of *addiction* as the sole basis of criminal liability.

The care with which the Court distinguished between use and addiction is demonstrated throughout Justice Stewart's opinion. "It would be possible," he noted, "to construe the statute under which the appellant was convicted as one which is operative only upon proof of actual use of narcotics within the state's jurisdiction" 370 U.S. 660 at 665. The clear implication of this statement is that such a statute, which is what Section 11550 now represents, would be constitutionally unobjectionable.

Later, the Court emphasized that "this statute, therefore, is not one which punishes a person for the use of narcotics . . . " (370 U.S. 660 at 666), again implying a different result were the statute worded otherwise. Finally, the *Robinson* decision disapproves of the fact that under the old statute, "California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State . . . " *Id.*

This interpretation that the statute erred in punishing addiction was clearly that of Justices Douglas and Harlan in concurrence, and it was the chief basis for Justice White's dissent, arguing that the majority had overlooked the fact that addiction was the sum of repeated use which the state had a right to regulate. It was the interpretation referred to by Justice Stewart six years later in *Powell v. Texas,* 392 U.S. 514, 20 L. Ed. 2d 1254, 88 S. Ct. 2145, when he emphasized

that:

> "In all probability, Robinson at some time before his conviction elected to take narcotics. But the crime as defined did not punish this conduct. The statute imposed a penalty for the offense of 'addiction'–a condition which Robinson could not control." 392 U.S. 514 at 567.

And it has been the interpretation of the criminal courts bar of California for the last thirteen years.

Respondent respectfully submits that there is no foundation in law or logic for changing that interpretation. Nothing in *Robinson* forbade punishment of those who use illegal drugs, and that is what Health and Safety Code Section 11550 now does. Respondent can only agree with Justice White that "I cannot believe that the Court would forbid the application of the criminal laws to the use of narcotics under any circumstances" *Robinson v. California,* 370 U.S. 660 at 689.

Nor does *Powell v. Texas,* 392 U.S. 514, 20 L. Ed. 2d 1254, 88 S. Ct. 2145, also cited by petitioner, lend any support to his position. In fact, *Powell* points up rather dramatically another key flaw in petitioner's argument for *certiorari.*

Petitioner argues that:

> "The condition of the Appellant resulting in his arrest is similar to chronic alcoholism. Thus a sickness that became chronic at some earlier period before the arrest of the Appellant and although originally a voluntary act or series of acts leading to the chronic condition, the Appellant was a victim of his chronic condition,

> which caused his arrest. It has been held that chronic alcoholism is a defense to the charge of public intoxication and is not itself a crime." (Petition, p. 12.)

This, however, represents a Kierkegaardian "leap of faith" from use of narcotics to addiction thereto. Such a syllogism is not only logically uncompelling, but also wholly unsupported by the record in this case. The fact is that the record in this case is *totally devoid* of any evidence reflecting addiction.

Thus petitioner here has presented this Court with a record woefully inadequate to support the analogy he attempts to cases involving chronic alcoholism. In fact, it is a record similar to but significantly less complete than that decried by the Court in *Powell* as "utterly inadequate" (392 U.S. 514 at 521).

In *Powell,* the record consisted of the testimony of the arresting officer for the prosecution and three defense witnesses: the appellant, a policeman who testified to appellant's lengthy history of arrests for drunkenness, and a psychiatrist who testified as an expert on the effects of alcoholism.

Justice Marshall expressed the Court's reluctance to render a decision of such far-reaching constitutional import as was sought in *Powell,* on the ground that:

> "In the first place, the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle. We know very little about the circumstances surrounding the drinking bout which resulted in this con-

viction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself. The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases." 392 U.S. 514, 521 - 522.

If the record in *Powell* was "utterly inadequate," it is difficult to find words to describe the record in the instant case, where the *only* witness was the arresting officer. Based on the record presented in this case, petitioner has no standing to challenge the application of the section to addicts since he has not made any showing that he is addicted (*United States v. Raines*, 362 U.S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519), and respondent respectfully submits that there is no conceivable Eighth Amendment infirmity in the application of the section to non-addicted users of narcotics.

There is nothing either cruel or unusual in a prohibition against the use of narcotics. California Health and Safety Code Section 11550 represents such a prohibition, and, purged of the error pointed out by this Court in *Robinson*, it is no longer subject to attack under the Eighth Amendment—certainly not on a record as sparse as that of the instant case.

II

The Ninety-Day Minimum Jail Sentence Imposed By The Section Is Reasonably Related To The Legitimate State End Of Preventing Narcotic Addiction.

Petitioner's second argument is that California's penalty provisions mandating a ninety-day county jail sentence upon

conviction for violation of Section 11550 deny him equal protection of the laws "as guaranteed by the Fourteenth Amendment." This contention is based upon an incomplete understanding of the state's statutory plan for combating narcotics abuse. A more thorough examination of the California penal provisions with regard to illegal use of opiates demonstrates that the section is not assailable on equal protection grounds.

Respondent must first admit to being frankly mystified by petitioner's choice of Sections 11359 and 11360 for comparison to Section 11550. Those sections deal with possession for sale and sale, respectively, of marijuana. Respondent can envision little to be accomplished by a comparison of the state's marijuana laws with its provisions against opiate abuse and can only assume that petitioner's choice of these sections was an error related to superficial analysis of the codes. A comparison of Section 11550 with the more analogous sections dealing with other heroin and narcotic offenses discloses a system of graduated punishments reasonably and logically related to the seriousness of the offense.

Section 11350 of the California Health and Safety Code deals with simple possession of various controlled substances, including heroin. It is a felony offense providing for imprisonment in the state prison for a minimum of two years and a maximum of ten years upon a first conviction, with penalties graduated upward for subsequent convictions of this or related offenses. A third offender, for example, faces fifteen years to life imprisonment in the state penitentiary.

Section 11551 of the California Health and Safety Code prohibits possession of heroin and other substances, with the intent to sell. This is also a non-alternative felony offense,

carrying a first offense penalty of five to fifteen years imprisonment in the state prison. Again, penalties are graduated upward for subsequent offenses. A second offense, for example, carries a ten-year minimum penalty; a third or subsequent offense carries a fifteen-year minimum.

Finally, Section 11352 of the same code prohibits sale, transportation, administration, importation and other similarly aggravated heroin offenses. A first offender who violates this section faces a minimum penalty of imprisonment in the state prison for five years; a second offender faces ten years to life, and a third offender fifteen years to life imprisonment in the state prison.

Similarly aggravated offenses involving opiates, such as inducement of a minor to violate any of the above sections or Section 11550, carry similarly enhanced penalties. See, *e.g.*, California Health and Safety Code Sections 11354, 11355. All are non-alternative felony offenses, triable only in the Superior Court.

This analysis discloses that of all offenses involving heroin punished in California, only Section 11550 is a misdemeanor, punishable only by county jail sentences and triable only in Municipal or Justice Courts. *All* others are felonies triable only in the Superior Court and punishable by state prison sentences.

In addition, California has provided a comprehensive system designed to treat and rehabilitate the narcotics addicts amenable to treatment or those in imminent danger of addiction. California Welfare and Institutions Code Sections 3000 - 3311. The California Rehabilitation Center has been established pursuant to this plan.

All of this clearly reflects both California's concern for

the problems of addiction and the more punitive approach it takes toward traffickers in heroin as opposed to addicts. Petitioner, however, complains of the ninety-day minimum jail sentence required for violation of Section 11550.

First, he mistakenly contends that a violator of this section is automatically denied probation. He is simply incorrect. The most cursory reading of the section reveals that probation is contemplated and provided for in the plain words of the statute. In fact, it is the rule rather than the exception.

The only thing left to complain of therefore is the mandatory ninety-day jail commitment. This is the *only* way in which it can conceivably be argued that use of narcotics is punished more severely than possession or sale. Respondent respectfully submits that only the most superficial analysis would consider ninety days in a county jail upon a misdemeanor conviction more harsh than probation on a felony offense with impending state prison punishment and all the other ramifications of the felony conviction.

Even under such analysis, however, the question is whether that ninety-day jail sentence denies petitioner equal protection of the laws under the Fourteenth Amendment. Since it cannot be contended that heroin addicts comprise a "suspect class" (see, *e.g.*, *Loving v. Virginia*, 388 U.S. 1, 9, 18 L. Ed. 2d 1010, 1016, 87 S. Ct. 1817; *Korematsu v. United States*, 323 U.S. 214, 216, 89 L. Ed. 2d 194, 198 - 199, 65 S. Ct. 193; *Griffin v. Illinois*, 351 U.S. 12, 17, 100 L. Ed. 891, 898, 76 S. Ct. 585), the test to be applied would appear to be whether the distinction drawn bears "some rational relationship to a legitimate state end." As was stated by this Court in *McDonald v. Board of Election*

Commissioners of Chicago, 394 U.S. 802, 808, 22 L. Ed. 2d 739, 745, 89 S. Ct. 1404:

> "Though the wide leeway allowed the states by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal."

California's aim in enacting Section 11550 was expressed most clearly in the case of *People v. Davis,* 240 Cal. App. 2d 496, 49 Cal. Rptr. 663. The court there recognized, as has the legislature, that:

> "Narcotics addiction is a process. (*People v. Victor,* 62 Cal. 2d 280, 301 [42 Cal. Rptr. 199, 398 P.2d 391].) At different stages the symptomatic effects of the process are different. (See *Ibid.* pp. 301 - 304.) The object of the statute is to proscribe a use of narcotics that is an activating part of the process of addiction, whatever may be the stage of that process at the time of their use. The provision making it an offense to be under the influence of narcotics must be construed in light of this object. So construed, the statute applies to every person who, following the unlawful use of narcotics, is under the influence thereof in

> any detectable manner. The symptoms of influence are not confined to those commensurate with misbehavior, nor to demonstrable impairment of physical or mental ability. (*Morales v. United States,* 344 F.2d 846, 850.) By making it an offense to be under the influence of narcotics the statute facilitates enforcement of the proscription against use." 240 Cal. App. 2d 496 at 501.

Pursuant to this intention, the legitimate state end served by the mandatory ninety-day jail term is the prevention—or at least discouragement—of addiction. Sequestration for ninety days, if it accomplished nothing more, would remove the user of heroin from his source of supply. *A fortiori,* a user who is unable to obtain heroin is, at least for that period of time, unable to become addicted to the drug. Thus, a heroin user not amenable to the kind of treatment provided by the rehabilitation program outlined above will, at the very least, have ninety days of abstinence from the drug—an abstinence which may prevent addiction, and will at least impede it. This may not be the optimum means of discouraging heroin addiction, it may not be the one this Honorable Court would choose, but it is a legitimate purpose served by the section.

As this Court has recognized, the state's decision on how to deal with a problem " 'does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.' *Snyder v. Massachusetts, supra* (291 U.S. at 105, 78 L. Ed. 677, 54 S. Ct. 330, 90 A.L.R. 575)." *Leland v. Oregon,* 343 U.S. 790, 799, 96 L. Ed. 1302, 1309, 72 S. Ct. 1002.

The rule thus is that:

> "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. See *McGowan v. Maryland,* 366 U.S. 420, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961); *Kotch v. Board of River Port Pilot Commissioners,* 330 U.S. 52, 91 L. Ed. 1093, 67 S. Ct. 910 (1947); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 55 L. Ed. 369, 31 S. Ct. 337 (1911)." *McDonald v. Board of Election Commissioners of Chicago, supra.*

Here, however, there is at least one obvious basis for the distinction made by the legislature, and their determination, given the broad and comprehensive nature of the state's program against opiate abuse, cannot be said to deny petitioner equal protection of the laws.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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STATE OF CALIFORNIA)
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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main St., Huntington Beach, Ca. 92648, that on NOVEMBER 2nd, 1976, I served the within BRIEF FOR RESPONDENT IN OPPOSITION on Petition for a Writ of Certiorari to the Appellate Department, Superior Court of California, in and for the County of Orange, Supreme Court No. 76-136, on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on NOVEMBER 2nd, 1976, at HUNTINGTON BEACH, CALIFORNIA.

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